

BEFORE THE UNITED STATES ARMY
CORPS OF ENGINEERS
LOS ANGELES DISTRICT

IN THE MATTER OF	:	
City of Carson	:	
Macco Channel Box Culvert, Del Amo	:	
Boulevard Overcrossing at I-405	:	Proceeding to Assess Class I
	:	Administrative Penalty Under
DA Permit	:	Clean Water Act § 309(g)
2002-00729-JLB	:	

PROPOSED ORDER

Under the authority granted by 33 U.S.C. § 1319(g) and 33 C.F.R. § 326.6, I, Richard G. Thompson, COL, District Engineer, Los Angeles District, propose to issue this Order assessing a Class I Administrative Penalty for non-compliance with conditions specified in the above numbered permit.

A. **NAME AND ADDRESS OF PERMITTEE:** City of Carson, 701 E. Carson Street, P.O. Box 6234, Carson, CA 90749.

B. **PERMITTED ACTIVITY:** To construct a double box-culvert within Macco Channel at the Del Amo Boulevard overcrossing at I-405, in Carson, Los Angeles County, California. Permit was issued after-the-fact ("ATF").

C. **CONDITIONS OR LIMITATIONS OF PERMIT VIOLATED:** Special Condition 1.

D. **DESCRIPTION OF THE VIOLATION:**

1. On March 28, 2002, the City submitted a pre-discharge notification for the construction of a double box-culvert within Macco Channel at the Del Amo Boulevard overcrossing at I-405. The notification identified permanent loss of 0.01 acre of waters of the U.S. within the Dominguez Channel, subject to Corps' jurisdiction under Section 404 of the Clean Water Act ("CWA"). The project qualified under Nationwide Permits ("NWP") 14 and 33.

2. On April 10, 2002, the City submitted an update on the above activities, stating the City would begin construction on April 15, 2002.

3. On April 10, 2002, Corps Project Manager (PM) Joshua Burnam spoke with Victor Rollinger of the City and explained that any work initiated before the issuance of a CWA section 404 authorization would be a violation of CWA Section 404, and would require ATF processing.

4. On April 11, 2002, the City submitted a follow-up memo to the April 10, 2002 phone call explaining the reasons why the City intended to start work on April 15, 2002 regardless of the lack of a valid permit. This memo included that the City expected mitigation to be at a 7:1 ratio.

5. On April 12, 2002, PM Joshua Burnam sent an email to Victor Rollinger with the City acknowledging receipt of the April 11, 2002 memorandum and stating that should work commence on April 15, 2002, the Corps would: process the CWA Section 404 permit as ATF NWP 14 and 33 to resolve violations of section 404 of CWA; require a tolling agreement be signed; and require mitigation at 7:1.

6. On April 29, 2002, the City notified the Corps that work had begun on April 29, 2002, in the absence of a valid CWA Section 404 permit or CWA section 401 water quality certification from the Water Board.

7. On May 10, 2002, the Water Board issued an ATF Conditional CWA section 401 Water Quality Certification for the project.

8. On May 28, 2002, Mr. Ken Boyce, Director of Public Works for the City, returned a signed agreement tolling the statute of limitations for processing the initial action as a violation.

9. On June 3, 2002, the Corps conditionally verified ATF NWPs 14 and 33, Permit no. 2002-00729-JLB, for the project ("Permit").

10. Special Condition (1) of the Permit required the "[The City] must mitigate for permanent impacts to waters of the United States at a 7:1 ratio by removal of exotic species and planting of pickleweed (*Salicornia virginica*) in a 0.07 acre portion of the Dominguez Channel. [The City] must submit a final detailed plan for this activity to the Water Board, the California Department of Fish and Game (CDFG), and [the Corps] within 45 days of the date of this letter."

11. On July 11, 2002, the City requested an extension to the 45-day deadline to submit the mitigation plan in order to incorporate the required mitigation into a larger project, which would require the plan be submitted well after the 45-day deadline. PM Joshua Burnam subsequently contacted the City by telephone to discuss the City's request. During this telephone conversation, the City committed to complete the plan by July 18, 2003, which the Corps accepted as the new deadline for submitting the mitigation plan pursuant to Special Condition 1 of the Permit.

12. On March 6, 2003, the Water Board issued a "Notice of Violation for Failure to Submit Required Information for the Macco Channel Box Culvert Del Amo Boulevard Overcrossing at I-405." The notice references that a reminder letter was sent to the City, from the Water Board, on November 27, 2002. The Notice instructed the City to immediately comply with Special Condition (1) of the permit.

13. On August 18, 2003, PM Joshua Burnam again contacted the City requesting submittal of the mitigation plan.

14. On September 11, 2003, PM Joshua Burnam again contacted the City requesting submittal of the mitigation plan.

15. On October 20, 2003, PM Joshua Burnam again contacted the City requesting submittal of the mitigation plan. In this instance, the City responded that the extreme delay was the fault of the CDFG and the fault of the Water Board for originally informing the City no permits were required for this project (sometime in past). PM Burnam issued a verbal notice of non-compliance.

16. On October 21, 2003 a proposal was received, prepared by Sapphos Environmental.

17. On October 31, 2003, and several subsequent occasions, the Corps and CDFG corresponded. The Corps determined from discussions with CDFG that the project delay was not the fault of the CDFG.

18. On November 18, 2003, PM Joshua Burnam received an email from Sapphos Environmental indicating "Carson does not have a current contract with Sapphos or another firm to perform any activities related to the mitigation plan." Subsequent discussions with Sapphos determined that Sapphos only had a contract to prepare the plan, never to implement it. Therefore, there is no current mechanism to implement the mitigation as required.

19. A second notice of non-compliance was issued to the City by electronic mail on December 10, 2003 by Joshua Burnam of the Corps.

20. The City failed to submit the requisite final mitigation plan by the July 18, 2003 deadline and has failed to construct, maintain, and monitor the mitigation as required in Special Condition 1 of the Permit.

E. LAWS AND REGULATIONS:

The Macco Channel is a water of the United States within the meaning of 33 CFR § 328.3(a) and a "navigable water" within the meaning of Section 502(7), 33 U.S.C. § 1362(7), of the Clean Water Act.

The materials used for fill in the jurisdictional tributary associated with the filling of the tributary constitute "pollutants" within the meaning of Section 502(6), 33 U.S.C. § 1362.6, of the Clean Water Act. Examples of a pollutant include, but are not limited to, dredged spoil, solid waste, earthen materials, incinerator residue, discarded equipment, concrete, rock, and sand. The discharge of such pollutants is defined as "any addition of any pollutant to navigable waters from any point source" [Section 502(14) of the Clean Water Act, 33 U.S.C. § 1362(14)].

The equipment discharging this material under the permit is a "point source" within the meaning of Section 502(5) of the Clean Water Act, 33 U.S.C. § 1362(14). A point source is defined as "any discernable, confined and discrete conveyance, including but not limited to, any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation or vessel or other floating craft from which pollutants are or may be discharged."

The City of Carson is a "person" within the meaning of Section 502(5) of the Clean Water Act, 33 U.S.C. § 1362(5).

Section 301 of the Clean Water Act, 33 U.S.C. § 1311, prohibits the discharge of dredged or fill material by a person from a point source into a water of the United States without a permit from the Corps of Engineers in accordance with the Clean Water Act, Section 404, 33 U.S.C. § 1344. Work that is carried out that does not conform to the authorization as granted may be subject to suspension and revocation as well as legal action (33 CFR Part 326).

The assessment of a Class I civil penalty by the Los Angeles District, Corps of Engineers as referenced below is authorized under 33 C.F.R. Part 326 dated December 8, 1989.

F. PROPOSED PENALTY AMOUNT: Based on the foregoing allegations and pursuant to Section 309(g) of the Clean Water Act, I propose to assess a Class I Administrative Penalty against the City of Carson in the amount of \$10,000 for non-compliance with Special Condition 1 of the Permit. The proposed penalty amount is subject to revision in the interest of justice after all evidence and comments have been received and reviewed. The amount, which may be assessed as a Class I Administrative Penalty, may not exceed \$10,000 per violation. The maximum amount of any Class I penalty is not to exceed \$25,000.

The penalty amount was determined after taking into account all of the factors identified in Section 309(g) of the Clean Water Act. These factors include, but are not limited to, the importance of the area affected, cumulative environmental impacts, size of area affected, the existence of contaminated dredged material, the relationship to program and statutory goals, knowledge and intent of the violator, economic benefits to the violator, the ability of the violator to pay, and the deterrence value regarding future violations in the area by others. This violation was determined to have a moderate impact on the environment, there appears to be no good-faith efforts on the part of the City to comply with the permit, and the need to discourage the City from repeating their transgression.

The Los Angeles District intends to issue a Final Order within 30 days after the receipt of this Proposed Order by the City of Carson unless a request for a hearing is received pursuant to the following section.

G. NOTICE OF THE OPPORTUNITY TO REQUEST A HEARING: As provided in Section 309(g)(2) of the Clean Water Act, the City has the right to request a hearing regarding the proposed penalty. Notice of a desire for a hearing shall address each item in the **Description of the Violation**. The request should deny or accept each stipulation in the complaint. If you do not respond to each point, it will be assumed that you do not wish to challenge that point. To secure a hearing, contact Dr. Aaron Allen, Acting Chief of the Regulatory Branch, U.S. Army Corps of Engineers, 915 Wilshire Boulevard, Los Angeles, California 90017.

The request for a hearing shall:

1. State the circumstances or arguments that are alleged to constitute grounds for defense.
2. Identify the facts that you intend to place at issue.

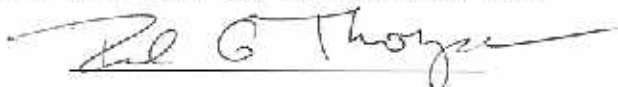
Any hearing will be held and conducted in accordance with the provisions of the guidance on Class I Civil Penalty procedures (33 C.F.R. Part 326, December 8, 1989). If no request for a hearing is received within the thirty-day public interest review period, the right to a hearing is waived.

If a hearing is requested, members of the general public who have provided comments on the public notice will be given the opportunity to present their views regarding the issues to be raised at hearing.

If the City of Carson does not request a hearing, the Final Order shall be issued after the closure of the comment period. Persons or entities commenting on the public notice shall be allowed an additional thirty days to request that the Final Order be set aside and a hearing be held in accordance with Section 309(g)(8) of the Clean Water Act. Such a hearing shall only be granted if, in the opinion of the District Engineer, evidence to be presented is material and was not considered in the preparation of the Final Order.

H. The penalty assessed for non compliance with Special Condition 1 of the permit identified previously will be due thirty days after the issuance of the Final Order. After a period of sixty (60) days after the Final Order is issued and the penalty remains unpaid, it will be considered in default and the imposition of interest, penalties, and handling charges as set forth in the Federal Claims Collection Act of 1966 (31 U.S.C. § 3717) will be implemented. The Los Angeles District may pursue civil litigation to collect all fees, interest, attorneys' fees and other costs associated with the penalty.

Issued this 14th day of January, 2004



Richard G. Thompson
Colonel, US Army
District Engineer